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No. 393

In the Supreme Court of the United States

OCTOBER TERM, 1957

GABRIEL GOMEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. B17) is reported at 245 F. 2d 344.

JURISDICTION

The judgment of the Court of Appeals was entered June 24, 1957 (Pet. App. A16). The time to file a petition for a writ of certiorari was extended until August 23, 1957. The petition for a writ of certiorari was filed on August 21, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether it was proper to consolidate for trial an indictment charging a conspiracy, among the man-

agers and teachers (of whom petitioner was one) of a school, to defraud the United States in relation to hours of instruction to veterans with two separate indictments charging the managers and two different students with conspiracy to defraud in relation to the instruction received.

RULES INVOLVED

Rule 8, F. R. Crim. P.:

> (a) *Joinder of Offenses.*
>
> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) *Joinder of Defendants.*
>
> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 13, F. R. Crim. P.:

> The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecu-

tion were under such single indictment or information.

STATEMENT

An indictment returned against petitioner and others in the United States District Court for the Southern District of Florida charged them with conspiring, from July, 1948 to April, 1951, to defraud the United States with relation to benefits for veterans in connection with a branch of the Berlitz School of Languages. The charge was that the manager of the school, Arango, and various teachers, of whom petitioner was one, falsely claimed that students had been given more supplies and had been taught more hours than had occurred (R. 1–15). Among the overt acts charged were several relating to requests by the manager that students sign false attendance slips (R. 11–13).

The indictment also contained a number of substantive counts charging the manager Arango and various other of the defendants with presenting false claims as to particular students. Counts 25–29 named petitioner, together with Arango and others. Petitioner was convicted on the conspiracy count and two substantive counts (25 and 26).[1] He was sentenced to imprisonment for fifteen months and fined $3,000 on the conspiracy count, and given additional punishment of $500 fine on each of the substantive counts (R. 82–83). On appeal, the conviction was affirmed.

Petitioner, another teacher, and Arango were tried

[1] Count 27 was dismissed. Judgment was arrested on counts 28 and 29 on the ground that the statute of limitations had run (R. 86–87).

together. Before trial, the cause was, over petitioner's objection, consolidated with two other indictments each of which named Arango, Martinez (not tried), and a particular student, charging them with conspiracy to commit frauds with relation to the number of hours of instruction (R. 121–127). The two consolidated indictments were dismissed by the trial judge before the case went to the jury (R. 95).

ARGUMENT

Petitioner's claim of prejudicial error in the consolidation of his trial with the two conspiracy counts (ultimately dismissed), naming management and two students, is without merit. The separate indictments with respect to the two students alleged the same general conspiracy relating to the Berlitz school within the period charged in the main conspiracy count naming petitioner. The activities with respect to the particular students were overt acts in furtherance of the general conspiracy which petitioner joined. Since he joined and furthered the general scheme, aware that he was part of a larger plan, he could properly be held a party to the general conspiracy even if he did not participate in every one of its ramifications. *Blumenthal* v. *United States,* 332 U. S. 539, 559.

As the court below pointed out, the cooperation of management, teachers, and students was necessary for the scheme to work successfully. Indeed, the groups were so interrelated that all could properly have been charged as part of one conspiracy. *Blumenthal* v. *United States, supra.* The danger of confusion was lessened by separating the indictment against management and teachers from those involving manage-

ment and students. But when it was discovered that only a limited number of persons were going to trial, it was proper to try together indictments growing out of this unified scheme. The offenses were in terms of Rule 8, F. R. Crim. P. "of the same or similar character" and were "acts or transactions connected together" as well as "parts of a common scheme or plan." Since joinder of counts would have been proper under Rule 8, a joint trial was proper under Rule 13.

The transcript of the testimony of four witnesses, which petitioner has included in the record, far from showing prejudice, serves to emphasize the absence of prejudice. Two of the witnesses, the Secretary Registrar of the school (Tr. 3–34) and a former teacher (Tr. 63 ff.), gave testimony, which, while not relating to acts by petitioner, did relate to the general scheme charged in the indictment naming petitioner. The third witness testified concerning admissions by a student, Schultz, named in one of the consolidated indictments (Tr. 34–54). Presumably that testimony fell with dismissal of the Schultz indictment. The fourth witness testified that, while he himself took lessons at his store from petitioner, Schultz, who worked at the same place, did not take lessons there (Tr. 55–63). Although the testimony with respect to Schultz with whom petitioner was involved related to a period which was barred as to the substantive offense by the statute of limitations,[2] it was relevant with respect to

[2] Substantive count 27 had named petitioner as a defendant and charged false claims with respect to Schultz (R. 54–55). That count was not submitted to the jury.

the continuing conspiracy in which petitioner was implicated.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

SEPTEMBER, 1957.